By email and mail
EFTA Court
1, Rue du Fort Thüngen
L-1499 Luxemburg-Kirchberg
Luxemburg

08 JULY 2025 (SFP67/21)
E-5/25

A German version has been attached

TO THE PRESIDENT AND THE MEMBERS OF THE EFTA COURT

Written Observations

Submitted, pursuant to Article 20 of the Statue of the EFTA Court by

Rainer Silbernagl

represented by
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nr@sfp.law and st@sfp.law),
acting as agents, in

Case E 5/25
Rainer Silbernagl -v- University of Liechtenstein

Rainer Silbernagl has the honour of submitting his Written Observations on the questions which were referred for an advisory opinion by the Princely Supreme Court of the Principality of Liechtenstein in case 08 CG.2021.120 (OGH.2024.101) to the EFTA court on 4 April 2025.

In accordance with Article 20 of the Statute of the EFTA Court, Rainer Silbernagl (the plaintiff) is entitled to submit Written Observations to the Court within two months of the date of the notification, i.e. by Monday 14 July 2025.

1 Relevant facts

1 To avoid unnecessary repetition, Rainer Silbernagl considers the facts set out in the Princely Supreme Court's Request dated 4 April 2025 to be complete and correct. The following facts are emphasised:

2 The plaintiff was employed by the defendant as an internal data protection officer for an indefinite period. He was also employed as a research assistant (postdoctoral researcher) until 30 June 2021 under a fixed-term additional service contract. The university terminated both employment relationship with effect from 31 May 2021 in a letter dated 27 January 2021 on the grounds that a newly announced incompatibility regulation in the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung), which excludes simultaneous employment as a research assistant (postdoctoral researcher) with other university positions, was to be applied. There were no other grounds for termination. The plaintiff had not been guilty of any misconduct. His behaviour during the employment relationship was impeccable. The University of Liechtenstein has not yet dismissed the plaintiff as data protection officer (findings in the judgement of the Princely Court of Justice 08CG.2021.120 of 19 July 2023 p. 17 and 19; application for referral by the Princely Supreme Court 08CG.2021. 120 of 4 April 2025 p. 4).

3 The defendant argues that the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung) were amended in order to free junior academics from administrative tasks. The aim of the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung) was not to avoid incompatibilities or conflicts of interest under data protection law (findings in the judgement of the Princely Court of Justice 08CG.2021.120 of 19 July 2023 p. 15 and 16). The amendment to the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung) did not remove the requirement to designate a data protection officer for the University of Liechtenstein as a public-law-corporation (Art. 37(1) lit a GDPR). As a contractual template, the Rules on Employment and Remuneration (Dienst- und

Besoldungsordnung) cannot change the designation requirement and cannot replace a formal dismissal.

4 The facts of the case are therefore similar to those in the ECJ judgement of 9 February 2023 C-560/21 KISA.

2 Relevant provisions of EEA law and applicable national law: Objectives and protection of Art. 38(3) GDPR

5 The GDPR aims to ensure to establish a uniformly high level of data protection in the European Union and European Economic Area (C-534/20 Leistritz AG para. 26; C-453/21 KISA para. 25). To this end, companies may act in the sense of self-attribution. As part of this self-responsibility granted by the European legislator, companies must designate a data protection officer as their own supervisory body. Data protection officers then monitor the company in accordance with the GDPR and may also advise it on implementation issues (European Commission, COM(2018) 43 final, p. 12). As data protection officers have a public supervisory function in the company, they are protected by the GDPR. Member States may provide for stronger - but not easier - protection for data protection officers (see Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 3 ans 60).

6 As is clear from settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, by considering the latter's usual meaning in everyday language, but also the context in which the provision occurs and the objectives pursued by the rules of which it is part (C-534/20 Leistritz AG para. 18 and 42).

7 The Liechtenstein Constitutional Court (StGH) now interprets the rules set out in Art. 7(4) Liechtenstein Datenschutzgesetz (DSG), which were adopted as implementing the GDPR, to mean that they only offer protection against dismissal if the data protection officer continues to work for the same employer. A data protection officer does not fulfil any duties under public law and further protection is 'disproportionate' and arbitrary (judgement of the StGH 2024/056 of 2 September 2024 para. 2.3., 2.5.2., 2.5.3, 3.1. and 3.2.).

8 Art. 7 of the Liechtenstein Datenschutzgesetz (DSG) refers to Art. 24 of the Liechtenstein Staatspersonalgesetz (StPG) for the dismissal of the data protection officer. This regulates the termination without notice for good cause. In Section 6(3) and (4) of the German Bundesdatenschutzgesetz (BDSG), the reception template of the Liechtenstein Datenschutzgesetz (DSG), there is also refered to Section 626 of the German Bürgerliches Gesetzbuch (BGB), which regulates termination without notice for good cause. According to the interpretation of the StGH, there is no protection against dismissal under data protection law in Liechtenstein in the event of

termination under labour law, as this is not expressly regulated in the Liechtenstein Datenschutzgesetz (DSG) and is not compatible with the basic values of Swiss labour law, which has been adopted in Liechtenstein.

9 If the data protection officer does not continue to work for the same employer, he or she is not subject to stricter legal protection under Liechtenstein law, according to the StGH. Art. 7(4) Liechtenstein Datenschutzgesetz (DSG) therefore **does not constitute a stricter** (and equivalent) **national provision**. According to the interpretation of the StGH, its application was restricted to situations that will probably never occur. Art. 7(4)Liechtenstein Datenschutzgesetz (DSG) has thus become a facilitating provision, since it allows the data protection officer to be dismissed at any time under labour law and no longer provides for dismissal.

10 The StGH did not refer to the previous European case law: In its judgement, the StGH itself interpreted what it understood by the verba legalia of the european legislator "dismissal" in Art. 7(3) and (4) of the Liechtenstein Datenschutzgesetz (DSG), as well as what is meant by "for performing his tasks".

11 The provisions of Article 7(4) of the Liechtenstein Datenschutzgesetz (DSG) thus make it practically impossible or excessively difficult to exercise the rights conferred by EEA law in practice (see E-11/19 and E-12/19 Adpublisher AG v J & K para. 45).

12 In the event of termination of the employment relationship, only the general European law protection of Article 38 GDPR exists in Liechtenstein for a data protection officer to fulfil his or her tasks under Article 38(4) and 39 GDPR - which the StGH has not applied.

3 Legal Arguments

3.1 Functional protection in accordance with Art. 38(3) GDPR

13 Art. 5(2) GDPR (**accountability**) has made the implementation of and compliance with the GDPR the responsibility of the responsible companies without official control. The controller or processor is responsible for compliance with data protection regulations and must be able to demonstrate this compliance (Art. 29 Data Protection Working Party,16/DE WP 243 rev.01 p. 18). The appointment of a data protection officer is

intended to monitor and improve this situation (Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 31).

14 Article 38(3) GDPR protects the functional independence of the data protection officer by **prohibiting two offences**, namely **dismissal** and **discrimination** (Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 26).

15 In its judgment of 22 June 2022, Leistritz AG C-534/20 para. 20, 21 and 22, the ECJ held that being so in accordance with the meaning which those words have in everyday language, the prohibition of the dismissal, by a controller or processor, of a data protection officer or of the imposition, by a controller or processor, of a penalty on him or her means, that that officer must be protected against

- any decision **terminating his or her duties**,
- by which he or she would be placed at a **disadvantage** or
- which would constitute a **penalty**.

16 In that regard, a measure terminating a data protection officer's employment contract taken by his or her employer and terminating the employment relationship existing between that officer and that employer and, therefore, also terminating the function of data protection officer in the undertaking concerned may constitute such a decision. The main purpose of this is to ensure that the functional independence of the data protection officer (complete independence, freedom from instructions, secrecy and confidentiality) is maintained, thereby guaranteeing the internal effectiveness of the GDPR.

17 Therefore, any dismissal or discrimination **directly** related to the performance of the data protection officer's tasks is completely prohibited and forbidden (absolute prohibition for performing his tasks).

18 The case law of the ECJ and other sources of European law provide the reasons that may nevertheless entitle an employer to dismiss a data protection officer:

19 A data protection officer who

- **no longer possesses the professional qualifications** required to fulfil his or her tasks in accordance with Article 37(5) GDPR (C-560/21 KISA para. 27; Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 51); or
- **does not fulfil his or her tasks** (on his or her own initiative); or
- **does not fulfil his or her tasks in accordance with the GDPR** (C-534/20 Leistritz AG para. 35); or
- is **subject to a conflict of interest** if it is entrusted with other tasks or duties that would require it to determine the purposes and means of the processing of personal data at the controller or its processor (C-453/21 X-FAB Dresden para. 38 to 56; Art. 29 Data Protection Working Party 16/DE WP 243 rev.01 p. 19); or

- is guilty of **gross misconduct** unrelated to the performance of his or her duties as data protection officer (e.g. theft, physical, psychological or sexual harassment or similar gross misconduct) (Art. 29 Data Protection Working Party 16/DE WP 243 rev.01 p. 18, 19).

must be able to be dismissed.

20 None of the above-mentioned facts under EU law apply in the case in question. The University of Liechtenstein has not provided any evidence that the reorganisation was necessary under data protection law. The reorganisation based on the Rules on Employment and Remuneration (Dienst- und Besoldungsordnung) was carried out for reasons of promoting young researchers. The notice of dismissal issued by the University (which was never carried out) is therefore in breach of Union law. The data protection officer **may not be dismissed in the event of the undertaking's restructuring** (Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 49).

3.2 Freedom from instructions and independence of the data protection officer

21 Art. 38(3) sentence 2 GDPR must be interpreted as meaning that the term 'dismissed' also covers an (ordinary) termination of the employment contract if this deprives the data protection officer of the basis for the activity. If national labour law took precedence over the GDPR, the member states could use their legislation to override the purposes and objectives of the GDPR.

22 A termination of the employment relationship under labour law, which deprives the data protection officer of the basis for his or her activities, constitutes a de facto - but not formally correct - dismissal, as the data protection officer can no longer perform his or her duties without an existing employment relationship.

23 The GDPR protects the data protection officer not only from formal dismissal, but also from measures that **effectively make the exercise of his or her function impossible**. An ordinary dismissal is therefore inadmissible if it terminates the activity of the data protection officer. Employers could thereby circumvent their accountability obligations.

24 The ineffectiveness of the termination (dismissal or removal) or measure is necessary to ensure that the data protection officer can continue to perform his or her duties independently and free from instructions. Enforcement measures to safeguard the independence of the data protection officer (including the prohibition of discriminating against or dismissing data protection officers for the performance of their duties) are to be considered necessary (European Data Protection Board, 2023

Coordinated Enforcement Action Designation and Position of Data Protection Officers Adopted on 16 January 2024, p. 3 and 27).

3.3 Legal arguments: "For performing his tasks"

25 The term "for performing his tasks" in Art. 38(3) GDPR must not be interpreted narrowly. The protective purpose of this provision ensures the functional independence of the data protection officer. The ECJ states that any decision terminating the duties of the data protection officer is to be regarded as a dismissal within the meaning of Art. 38(3) GDPR (C-534/20 Leistritz AG para. 21; C-560/21 KISA para. 17; C-453/21 X-FAB Dresden para. 21).

26 A narrow interpretation would not fulfil the protection mechanism of the GDPR and would jeopardise the effective performance of the tasks of the data protection officer: This can be argued to the extent that, in the event of economic difficulties of a company that is obliged to designate a data protection officer and has selected one of its employees for this purpose, the tasks of the data protection officer must continue to be performed as long as the employer continues to operate, in view of the objectives of the GDPR and the contribution that the data protection officer makes to achieving them (Opinion of the Advocate General in Case C-534/20 Leistritz AG para. 49).

27 The term 'for performing his tasks' includes not only direct and explicit measures aimed at the activities of the data protection officer, but also **indirect measures** that could impair his or her independence (in whatever form and for whatever reason). A narrow interpretation would otherwise allow employers to undermine the activities of the data protection officer through restructuring or other organisational measures without formally violating the GDPR.

- In the **Leistritz AG** case, the dismissal of a data protection officer - similar to the present case - was justified by a reorganisation that was to lead to the outsourcing of the data protection department (C-534/20 Leistritz AG para. 11 and 12). In the present case, the defendant University of Liechtenstein did not make any structural or actual changes to the position of the data protection officer.
- The **KISA** case concerned the dismissal of a data protection officer who simultaneously held another position in the company which, in the opinion of the employer, would lead to a conflict of interest (C-560/21 KISA para. 9 and 10). In this case, no conflict of interest was identified due to the plaintiff's other employment (which was in any case limited until 30 June 2021).
- The **X-FAB Dresden** case examined the dismissal of a data protection officer who was also the chairman of the works council and was dismissed by X-FAB at the request of the supervisory authority (Thüringer Landesbeauftragten für Datenschutz und Informationsfreiheit) (C-453/21 X-FAB Dresden para. 10 to 13).

The ECJ found that a conflict of interest within the meaning of Art. 38(6) GDPR may exist where a data protection officer is entrusted with other tasks or duties, which would result in him or her determining the objectives and methods of processing personal data on the part of the controller or its processor. This is also not the case here.

28 To summarise, the case law of the ECJ to date shows that the term 'for performing his tasks' is not interpreted narrowly. A broad interpretation is necessary to ensure that the data protection officer can fulfil his or her duties effectively without having to fear reprisals, structural obstacles or direct and indirect undermining of his or her office.

29 In the present case, the termination due to the alleged conflict of interest of the incompatibility regulation set out in the Dienst- und Besoldungsordnung is a termination **precisely because** of the exercise of the function of the Data Protection Officer.The Commission is pursuing **supranational objectives** with the GDPR. The data protection values enshrined therein facilitate the legally compliant handling of data flows and promote the convergence of legal systems across the world and Europe (European Commission COM (2018) 43 final, p. 6). A national reduction of the level of protection of the GDPR, as is the case here through interpretation of labour law and national regulations contrary to European law, does not pursue these objectives: the legal consequences of the unlawful dismissal of a data protection officer would have different legal consequences in each member state, as national labour laws and data protection laws are not uniform. For example, a data protection officer in Germany could invoke solid legal protection, whereas in Austria he or she would only be afforded moderate protection under labour law and in Liechtenstein - according to the interpretation of the StGH - no protection at all. The possibilities for data protection officers to work would differ accordingly: those with solid protection would be able to devote themselves to their tasks, while others would have to adapt their supervisory function to the wishes of the employer for fear of dismissal and termination of the employment relationship.

3.4 National labour law does not create uniform European functional protection for data protection officers

30 Lastly, the StGH's own argument that a 'restriction on dismissal under labour law' is too far-reaching and 'completely disproportionate from the perspective of Liechtenstein law' must be countered:

31 The GDPR also offers a corresponding provision on damages in Art 82 of the GDPR, which must be considered from the perspective of equivalence and effectiveness (cf. C-300/21 Österreichische Post II; C-340/21 NAP; C-456/22 Gemeinde Ummendorf; C-667/21 Krankenkasse Nordrhein; C-687/21 MediaMarktSaturn). The StGH could also

have applied these if it considered the continuation of the function to be economically too far-reaching.

32 Otherwise, the defendant University of Liechtenstein never examined whether less drastic alternatives to dismissal existed.

33 The incompatibility regulation was created by the university itself and could have been implemented very easily through organisational measures (e.g. as was already the case at the time: separate employment contracts, separate infrastructure, fixed temporal separation of activities, temporary establishment of separate offices). There was no need to terminate the plaintiff's position as data protection officer, in particular since the temporary scientific employment would have expired on 30 June 2021.

34 Furthermore, the European Economic Area assigns (horizontal and flanking) policies to the EU with regard to the termination of the employment relationship (Art 153(1) (d) TFEU; minimum provisions Art 67(2) and Art 68 EEA Agreement and Annex XVIII EEA Agreement). Neither the EEA Agreement nor the primary law of the EU assigns the member states the competence to reduce European legal acts to absurdity through matters within the competence of the member states (**principle of loyalty**).

4 Proposals for answers to be given by the EFTA Court to the questions

35 The questions referred by the Princely Supreme Court (OGH) prove to be justified, as the judgement of the StGH, in its interpretation of the terms "dismissed" and "for performing his tasks", would make it possible, with reference to Art. 7(3) and (4) Liechtenstein Datenschutzgesetz (DSG), to dismiss a data protection officer at any time by giving notice and thus to eliminate the internal objectives of the GDPR and internal monitoring without this being reviewable or contestable.

36 According to previous European case law, the protection of functions is to be viewed broadly, as it must protect the data protection officer from any decision that would terminate their role. The grounds for dismissal of a data protection officer developed in European case law to date do not exist in this case.

37 In the opinion of the plaintiff, the questions referred could be answered by the EFTA Court as follows:

First Question: Must the second sentence of Article 38(3) of the GDPR be interpreted as meaning that it precludes a national provision such as, in the present case Article 7(4) of the Data Protection Act, according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause,

in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly?

> *A data-protectionofficer shall according to Art. 38(3) sentence 2 of the GDPR not be dismissed or penalised by the controller or the processor for performing his tasks. A national provision according to which a data protection officer employed by a public body may only be dismissed by the public body with just cause, in particular, where circumstances exist in the presence of which continuation of the employment relationship can, on good faith grounds, no longer be reasonably expected, even if the data protection officer precisely does not perform his function or does not perform it correctly, is in so far contrary to Art. 38(3) sentence 2 GDPR, as such legislation does not undermine the achievement of the objectives of the GDPR. This is the case if the data protection officer does not perform his function or does not perform it correctly due to the actions of his or her employer.*

Second Question: Must the second sentence of Article 38(3) of the GDPR as worded in German be interpreted as meaning that the term "dismissed" [in German "abberufen"] includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity of data protection officer ceases to exist?

> *Art. 38(3) sentence 2 of the GDPR must be interpreted as meaning that the term "dismissed" includes also an (ordinary) termination of the employment contract by the employer of the data protection officer if, as a result, the employment contract basis and thus the factual possibility of exercising the activity as data protection officer ceases to exist.*

Third Question: Does the protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, require an interpretation of this provision and corresponding national rules serving the same protective purpose, such as Article 7(3) and (4) of the Data Protection Act, to mean that a dismissal which is effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact?

> *The protective purpose of the second sentence of Article 38(3) of the GDPR, that is to say, safeguarding the functional independence of the data protection officer, requires an interpretation of this provision and corresponding national rules serving the same protective purpose to mean that a dismissal which is*

effected contrary to these rules entails that the dismissal is void and that the employment relationship between the employer and data protection officer as such remains intact.

On behalf of Rainer Silbernagl

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